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No. 85-1370

In The
Supreme Court of the United States
October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF OF THE STATES OF AMERICAN SAMOA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, IOWA, LOUISIANA, MINNESOTA, PENNSYLVANIA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND VERMONT AS AMICI CURIAE IN SUPPORT OF APPELLEE

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.2, the signatory States submit this Brief as *Amici Curiae* in support of the Appellee, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas. Since this Brief is

being sponsored and filed by the aforementioned States, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINIONS BELOW

The Opinions of the Arkansas Supreme Court are reported in 697 S.W.2d 94 (1985) and 698 S.W.2d 802 (1985). The unreported opinion of March 29, 1985, and the Order of April 15, 1985 of the Chancery Court of Pulaski County, Arkansas and the Opinions of the Arkansas Supreme Court are contained in the Appendix attached to Appellant's Jurisdictional Statement.

III. INTEREST OF AMICI CURIAE

The interests of the States joined as Amici in this Brief concern what they believe to be the far reaching effects, raised by the issue in this case, relating to a generally applicable state tax structure which imposes a retail sales tax upon retail sales of most, but not all, types of publications.

Amici strongly believe that a State should not be precluded by First Amendment guarantees from making reasonable choices of publications as subjects for taxation or exemption. A contrary result would straitjacket the States with an iron clad constitutional rule whereby all retail sales of every publication would have to be taxed or would have to be exempt. Since there are clearly different types of publications, such a constitutional rule is unwarranted and

would unjustifiably restrict the States in making their choices of subjects for taxation.

IV. ARGUMENT

Arkansas, in common with most States in the Nation, imposes a generally applicable retail sales tax whereby gross receipts from the retail sales of tangible personal property are taxed. While most retail sales are subject to tax, Arkansas has chosen to exempt certain enumerated transactions. States which impose retail sales taxes generally levy the tax upon all retail sales of tangible personal property and, by specific enumeration, create tax exemptions. In addition, the incidence of the sales tax is usually upon the consumer, and not upon the retail seller. *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 347-8 (1968).

In its choice of tax exemptions, Arkansas exempted retail sales of newspapers and retail sales of religious, professional, trade and sports publications. Ark. Stat. Ann. § 84-1904(f) and (j). Retail sales of other types of publications, whether in the form of books, magazines, periodicals, advertising, newsletters, tapes, records, pamphlets, or whatever, are subject to tax. Arkansas, thus, imposes its sales tax upon sales of most types of publications in many formats and exempts only a few narrowly selected classes. Most types of magazines are subject to the Arkansas tax.

Other States, such as Iowa, impose their retail sales taxes generally upon retail sales of tangible personal property and create tax exemptions for retail sales of news-

papers, but not for magazines. Iowa Code §§ 422.43(1) and 422.45(9) (1985). These States also tax sales of most other types of publications.

Appellant's and its amici's argument is that a State must exempt from its retail sales tax the retail sales of publications, such as Appellant's magazine, if the State elects to exempt retail sales of newspapers. Appellant and its amici further argue that as long as Arkansas has chosen to exempt retail sales of a few magazines, Arkansas is obliged to exempt retail sales of all magazines, including that of Appellant. The thrust of these arguments is that a State must either impose sales taxes upon sales of all publications or upon none. Appellant's and amici's arguments are grounded upon the First Amendment to the United States Constitution.

Appellant and its amici rely upon the cases of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) to support their contention that the Arkansas sales tax structure violates First Amendment guarantees. However, these cases are readily distinguishable from the case at hand.

In *Grosjean*, this Court held that a Louisiana license tax, imposed upon all newspapers with more than 20,000 weekly circulation, violated the First Amendment. The tax, single in kind, was enacted within the context of a political atmosphere of retribution against the larger newspapers that had been critical of Senator Huey Long. This Court was careful to state that newspaper publishers were not "immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250.

The Arkansas sales tax is an "ordinary form of taxation for support of the government." There is no evidence that this tax was enacted with the intent to punish any form or type of publication. The tax and the statutory exemptions for sales of newspapers and the few other types of publications are not based on size or circulation. Therefore, *Grosjean* does not support Appellant's position.

In *Minneapolis Star*, this Court held that a Minnesota "use tax" upon the cost of ink and paper components incorporated into newspapers to be sold at retail violated the First Amendment in two respects. First, the ink and paper tax was a differential tax imposed only upon the press; other producers of tangible personal property for retail sale were exempt from tax upon their costs of components. Therefore, the Minnesota ink and paper tax was not part of any generally applicable economic regulation. Since Minnesota offered no justifiable reason for such differential taxation of the press in comparison with other producers, the use tax was held to violate the First Amendment. 460 U.S. at 581-590.

Second, the ink and paper tax only applied to a few newspapers because of a $100,000 exemption for purchases of ink and paper. No other producers were offered similar tax exemption. Minnesota did not offer any justification for a tax structure which, because of this $100,000 exemption, only impacted upon a few newspapers. Therefore, this Court held that the effect of the $100,000 exemption violated the First Amendment. 460 U.S. at 592-3.

The Arkansas sales tax does not contain the infirmities of the Minnesota ink and paper tax. The Arkansas sales tax is a generally applicable tax structure, of which

tax upon the retail sales of Appellant's magazine is a part. The Arkansas sales tax is not a differential tax which singles out Appellant and a handful of others for taxation not accorded to most other sellers of tangible personal property.

In addition, the Arkansas sales tax does not exempt small (or large) publishers and is not based upon circulation. Retail sales of publications of the same type (newspapers and religious, professional, trade and sports publications) are not taxable. Retail sales of all other types of publications are taxable.

Appellant's contention that *Minneapolis Star* proscribes any attempt to classify publications by taxing some and exempting others misstates what this Court held. *Minneapolis Star* does preclude a State from discriminating against the same type of publication (newspapers) with the result that only a handful are taxable. The Arkansas tax structure does not produce that result. Most types of publications will be subject to the Arkansas sales tax; only a few types will not. Therefore, *Minneapolis Star* does not support Appellant's position.

Prior precedents will support the Arkansas sales tax structure. The mere fact that not all publishers are subject to the same economic regulation does not render that regulation, otherwise general in application, invalid under the First Amendment. *Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983); *Mabee v. White Plains Publishing Company,* 327 U.S. 178 (1946).

In *Mabee,* this Court upheld an exemption of certain types of small newspapers from the Fair Labor Standards Act of 1938 while other types of small newspapers

and large newspapers were covered, in common with other business, by that Act. This Court distinguished *Grosjean* in that "There the press was singled out for special taxation and the tax was graduated in accordance with the volume of circulation. No such vice inheres in this legislation." 327 U.S. at 184. The Arkansas tax structure does not single out Appellant's publication for "special taxation" and the Arkansas sales tax classifies the publishers more equally than the economic regulation in *Mabee.*

In *Regan,* this Court held that, under the circumstances, First Amendment guarantees were not implicated where a non-profit organization within 26 U.S.C. § 501 (c)(3) was disqualified from attaining tax-exempt status because of its substantial lobbying activities even though veterans' organizations which engaged in substantial lobbying would be eligible for tax-exempt status. This Court viewed tax exemptions as "a form of subsidy that is administered through the tax system." 461 U.S. at 544.

The non-profit organization argued that "because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of § 501(c)(3) organizations." 461 U.S. at 547. The Court of Appeals had found that this classication was subject to the "strict scrutiny" equal protection test because that Court perceived that First Amendment rights were affected on a discriminatory basis. 461 U.S. at 548. This Court rejected the Court of Appeals view as suggesting "that strict scrutiny applies where Congress subsidizes some speech, but not all speech. This is not the law." 461 U.S. at 548.

In essence, *Regan* can stand for the proposition that not all who exercise First Amendment rights are entitled to be subsidized by government in the form of a tax exemption even if some are so subsidized. As long as government does not formulate obstacles to those who exercise First Amendment guarantees, does not treat the same situations differentially, and does not engage in censorial conduct, government is free to select tax exemptions, within the context of general economic regulation, as a matter of legislative grace. 461 U.S. at 549-550. The Arkansas tax structure does not produce these prohibited results.

If a State chooses to tax the retail sale of magazines and other publications, but not newspapers, and also imposes the tax upon most retail sales of tangible personal property, such tax structure constitutes a general economic regulation and not the unconstitutional differential taxation of the press. Also, if a State, such as Arkansas, chooses to tax the retail sale of most types of publications, but not newspapers and four narrow and isolated categories of publications, such tax structure constitutes a general economic regulation.

Arkansas has an appropriate justification for exempting retail sales of newspapers from its sales tax. A substantial method of marketing newspapers involves children (paperboys and papergirls). Under these circumstances, "requiring the sales tax to be paid on these transactions would place a great burden both on the vendors, whose age and lack of business experience would render it difficult to comply with the monthly reporting procedures required by the Act, and the Department of Revenue, which would be charged with policing these sales and enforcing payment of the tax." *Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Co.*, 312 N.C. 211, 322 S.E.2d 155, 163 (1984), *appeal dismissed for want of a substantial federal question,* — U.S. —, 86 L.Ed.2d 710, 105 S.Ct. 2693 (1985). This method of marketing newspapers by minors is unique and is not associated with substantial sales of other publications or of tangible personal property in general.

In addition, these children would be required to keep adequate records so that the State could audit them and determine whether the proper amount of sales tax had been remitted. Yet, how could the State be expected to audit records of these minors who would have difficulty understanding such record keeping requirements? Such an audit could also be a traumatic and confusing experience for these youngsters.

Within the context of a generally applicable sales tax on retail sales of tangible personal property, it is difficult to discern what purpose is served by requiring the State to tax the retail sales of newspapers if the State elects to tax the retail sales of other publications in common with other retail sales of tangible personal property. Also, it does not make sense to require a State to exempt retail sales of all publications because of the practical difficulties justifying a tax exemption for newspaper sales. Yet, Appellant's position is that the tax status of all publications is dictated by the State's treatment of newspapers.

While newspapers may also be sold by adults, since substantial sales involve children, it is not unreasonable

for Arkansas to extend the sales tax newspaper exemption to all newspaper sales. Under such tax structure, all retail sales of newspapers would receive like treatment, a condition that obviously would not burden the First Amendment.

It is a reasonable exercise of legislative power to exempt religious publications from taxation. *Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970). Professional, trade, and sports publications differ substantially in kind and in purpose from the other types of publications that would be subject to the Arkansas sales tax. Therefore, Arkansas ought to be able to choose to subsidize these isolated types of publications by tax exemption. A contrary result would require an iron clad rule of subsidy of either all speech or of none, not in accord with *Mabee* and *Regan.* Appellant and its amici do not cite any cases which would dictate an "all or nothing" tax policy under the First Amendment.

The Arkansas sales tax structure, with respect to sales of newspapers and other publications, involves the reasonable exercise of legislative discretion. Sound reasons exist for the newspaper and isolated publication tax exemptions. Accordingly, the Arkansas sales tax structure does not violate First Amendment guarantees.

V. CONCLUSION

For the reasons spelled out above, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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